

91-800

No. _____

Supreme Court, U.S.

FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CUMBERLAND & OHIO CO.
OF TEXAS, INC., *Petitioner*

v.

FIRST AMERICAN NATIONAL BANK,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

When a party to a diversity appeal moves to certify a state law question to a state court of last resort, should a "rule of deference" be applied by the federal Court of Appeals, which either requires the Court of Appeals to:

1. Certify the issue, if the applicable state law is uncertain and there is a difference of opinion as to the applicable state law principle either within the Court of Appeals panel or between the Court of Appeals judges and the district court judge; or

2. Apply enumerated factors in determining whether to certify the issue, including, but not necessarily limited to, the following: Whether state law is so uncertain as to require a prediction as to what the state court of last resort would rule under the circumstances; whether there is disagreement as to the applicable state law either within the appellate panel or between the appellate judges and the district court judge; the relative experience of the appellate and district court judges in resolving issues under the applicable state law; and the significance of the additional cost involved in certifying the question, considering the monetary amount of the judgment being reviewed and other relevant factors.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Cumberland & Ohio Co. of Texas, Inc., the successor corporation of Herbert Materials, Inc., and the respondent, First American National Bank.

Petitioner, Cumberland & Ohio Co. of Texas, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to the requirements of Rule 29.1. of the Supreme Court Rules.

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CUMBERLAND & OHIO CO.
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v.

FIRST AMERICAN NATIONAL BANK,
Respondent

PETITION FOR WRIT OF CERTIORARI
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The petitioner, Cumberland & Ohio Co. of Texas, Inc., ("Cumberland & Ohio") prays that a writ of certiorari issue to review the orders, judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 936 F.2d 846, and is reprinted in the appendix hereto at page 1a.¹

The judgment of the trial court has not been reported. It is reproduced in the appendix hereto at page 12a.

¹ References to items contained in the appendix are set forth in this format.

JURISDICTION

Cumberland & Ohio filed this action in the Tennessee Chancery Court, Davidson County. Respondent, First American, removed the case to the United States District Court for the Middle District of Tennessee pursuant to 28 U.S.C. § 1332, diversity of citizenship. The jury returned a \$6 million verdict for Cumberland & Ohio and judgment was entered in that amount on October 2, 1989. First American's post-trial motion for entry of a judgment notwithstanding the verdict was denied.

On First American's appeal, the Sixth Circuit on June 12, 1991, reversed the District Court's orders and directed that judgment be entered in favor of First American. Appendix page 9a. Cumberland & Ohio's timely petition for rehearing and suggestion for rehearing *en banc* were denied on August 14, 1991. Appendix page 11a. Joined with Cumberland & Ohio's petition for rehearing was a motion to certify the state law issues to the Tennessee Supreme Court which was denied on July 23, 1991. Appendix page 10a.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Tenn. Code Ann. § 28-3-105. (1980)

Property tort actions - Statutory Liabilities - Alienation of affections. - The following actions shall be commenced within three (3) years from the accruing of the cause of action:

- (1) Actions for injuries to personal or real property;
- (2) Actions for the detention or conversion of personal property;
- (3) Civil actions based upon the alleged violation of any federal or state statute creating monetary liability for personal services rendered, or liquidated damages or other recovery therefor, when no other time of limitation is fixed by the statute creating such liability;
- (4) Actions for alienation of affections.

Tenn. Code Ann. § 28-3-109. (1980)

Rent - Official Misconduct - Contracts not otherwise covered - Title Insurance - Demand Notes. - (a) The following actions shall be commenced within six (6) years after the cause of action accrued:

- (1) Actions for the use and occupation of land and for rent;

(2) Actions against the sureties of guardians, executors and administrators, sheriffs, clerks, and other public officers, for nonfeasance, misfeasance, and malfeasance in office; and

(3) Actions on contracts not otherwise expressly provided for.

(b) The cause of action on title insurance policies, guaranteeing title to real estate, shall accrue on the date the loss or damage insured or guaranteed against is sustained.

(c) The cause of action on demand notes shall be commenced within ten (10) years after the cause of action accrued.

STATEMENT OF THE CASE

Petitioner, Cumberland & Ohio, is the successor corporation to Herbert Materials, Inc., which was originally chartered in 1867 and continually operated in Nashville, Tennessee until 1983. In 1981 it entered into a \$2.5 million working capital loan with First American. In August, 1988, Cumberland & Ohio, which was then a Texas corporation, filed this civil action in the Chancery Court for the State of Tennessee in Davidson County, Tennessee. First American removed the case to the United States District Court for the Middle District of Tennessee on diversity grounds, under the provisions of 28 U.S.C. § 1332.

The complaint asserted that First American had breached its contractual obligations to Cumberland & Ohio by failing to fund and wrongfully accelerating a working capital loan and the company's term loans; by failing to perform its contractual obligations in good faith; and by failing to give notice of a substantial change in the banking relationship. It was alleged that as a result of First American's breach of its contractual duties, the company sustained operational losses, and was forced to dispose of assets at below market prices.

In its answer, in the pre-trial order, and during the trial, First American asserted that Cumberland & Ohio's claims were barred by the Tennessee statutes of limitation. It filed a trial brief and a motion in limine, asserting its position on the statute of limitation issue.

The district court took the statute of limitation issue under advisement at the inception of the trial. At the close of the plaintiff's proof, First American moved for a directed verdict, asserting that all claims were barred by Tennessee's three-year statute of limitations, applicable to claims for injury to property. The Court denied the motion, holding that Tennessee's six-year statute of limitations for breach of contract claims was

applicable. Relevant portions of the district court's memorandum opinion on the statute of limitations are as follows:

1. The district court reviewed prior Tennessee decisions, and concluded that Tennessee courts have previously applied the three year "injury to property" statute of limitations only when the claim was founded in tort and the damages at issue were injuries to property. Appendix page 13a.

2. The district court also found that the plaintiff's claims were governed by the six year breach of contract statute of limitation, because they were breach of contract claims, not involving injury to property.

In the present case, the plaintiff has alleged that it incurred monetary losses in selling its inventory and assets at below market price. Plaintiff has not alleged that the defendant injured its property, but that defendant's actions forced plaintiff to suffer operating losses and to sell its property under such time pressures that plaintiff received less money than it would have otherwise received for the sale. The inherent value of the property remained the same. As the Court of Appeals found under similar circumstances in Harvest Corporation [Harvest Corporation v. Ernst & Whinney, 610 S.W.2d 727 (Tenn. Cert. App. 1980), perm. app. denied (Tenn. 1980), pet. hear. denied (Tenn. 1981)], "such money damages do not constitute damage to property."

The Court also finds that plaintiff has presented claims lying in contract and not tort. Plaintiff's losses are alleged to have resulted from the defendant's allegedly bad faith performance of the contract. Plaintiff has not sought to recover on the ground that defendant's bad faith amounted to conspiracy or fraud, but that defendant's performance breached the contract's implied covenant of good faith. Accordingly, the Court finds that these claims are thus governed by the six year statute of limitations prescribed in Tennessee Code section 28-3-109.

Appendix page 14a.

The jury returned a verdict in favor of the plaintiff in the amount of \$6,000,000, which was entered as the judgment of the Court.

In its post-trial motion for entry of a judgment notwithstanding the jury's verdict, First American reasserted the statute of limitations defense. It also argued, for the first time, the affirmative defense that judgment should not have been entered against it because Cumberland & Ohio had

failed to repudiate a release that it had executed under duress in 1983. Each of these issues was briefed by the parties. The district court denied the bank's post-trial motion.

First American appealed to the Sixth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291. The bank renewed its argument on the statute of limitations, and again asserted its untimely argument regarding the repudiation of the lease. The Sixth Circuit addressed both of these state law questions in its opinion, disagreeing with the district court on each of them, and reversing the judgment for the plaintiff.

In its discussion of the statute of limitations issue, the Sixth Circuit rejected the district court's analysis of the decision in Harvest Corporation v. Ernst & Whinney, 610 S.W.2d 727 (Tenn. Ct. App. 727). Instead, the Court of Appeals adopted the reasoning of a Seventh Circuit opinion, which had attempted to predict the position the Tennessee Supreme Court would take if confronted with similar facts:

We agree with the Seventh Circuit that Tennessee's highest court would impose a three year limitations period on such economic duress claims, where the plaintiff seeks damages for alleged injuries to property.

936 F.2d at 849; Appendix page 7. (emphasis added).

As a separate basis for reversal, the Court of Appeals held that, as a matter of Tennessee law, a release that is executed under economic duress is voidable, not void, and that Cumberland & Ohio had therefore failed to timely repudiate the 1983 release. The Court of Appeals did not refer to Tennessee case law holding that repudiation is an affirmative defense, or to the obvious untimeliness of First American's assertion of that defense.

Cumberland & Ohio subsequently filed a petition for rehearing, a suggestion for rehearing *en banc*, and a motion to certify both of the state law issues to the Tennessee Supreme Court pursuant to Rule 23 of the Tennessee Supreme Court Rules. Appendix page 16a. The Sixth Circuit denied the motion to certify on July 22, 1991, and denied the petition for rehearing on August 14, 1991. Appendix pages 10a and 11a.

REASONS FOR GRANTING THE WRIT

Summary of the Petitioner's Contention

The purpose of this petition is to request this Court to re-examine the policy relating to granting motions to certify state law questions in diversity cases. The certification procedures now in effect in more than

forty states provide an effective and relatively inexpensive means of ensuring consistent and accurate application of state law principles in federal diversity actions, but the use of these procedures obviously requires state and federal cooperation. Although the acceptance of certification is within the discretion of the state court of last resort, the opportunity to exercise this discretion is dependent upon whether the federal appellate courts decide to afford that opportunity. As this case illustrates, that opportunity may be denied when objective considerations indicate it should be extended, and may, indeed, be denied for any reason or no reason. In the past, this Court has attempted to encourage certification by federal appellate courts, while expressing reluctance to infringe upon their complete discretion to deny it. The petitioner respectfully submits that the time has come to provide at least directional assistance for the Court of Appeals with regard to certification, so that the desirable purpose of certification procedures can be more fully effectuated, and the policies underlying Erie Railroad v. Tompkins, 304 U.S. 64 (1938) more fully realized.

Argument

When a party to an appeal moves to certify a state law question to a state court of last resort, a "rule of deference" should be applied, which either requires the Court of Appeals to:

1. Certify the issue, if the applicable state law is uncertain and there is a difference of opinion as to the applicable state law principle either within the Court of Appeals panel or between the Court of Appeals judges and the district court judge; or

2. Apply enumerated factors in determining whether to certify the issue, including, but not necessarily limited to, the following: Whether state law is so uncertain as to require a prediction as to what the state court of last resort would rule under the circumstances; whether there is disagreement as to the applicable state law either within the appellate panel or between the appellate judges and the district court judge; the relative experience of the appellate and district court judges in resolving issues under the applicable state law; and the significance of the additional cost involved in certifying the question, considering the monetary amount of the judgment being reviewed and other relevant factors.

The twin policies underlying the decision in Erie Railroad v. Tompkins 304 U.S. 64 (1938) was to discourage forum shopping as between state and federal courts, and to ensure that removal of actions to federal court will not substantially affect enforcement of rights granted by

the state. Guaranty Trust Company v. York, 326 U.S. 99 at 109 (1945); Hannah v. Plummer, 380 U.S. 460, 468 (1965). These policies are relatively easy to implement when the applicable state law is clear and settled. Implementation becomes less easy as state law becomes less clear and more subject to the interpretation of individual judges. When, as in this case, state law is so uncertain as to require an outright prediction as to what the state court of last resort would rule under the circumstances, the Erie policies may become a mirage.

In the present case, for example, the Sixth Circuit Court rejected the analysis of a district judge who had substantial experience as a Tennessee state judge, disagreed with his interpretation of a Tennessee Court of Appeals' decision which was on point, and instead adopted the prediction of a Seventh Circuit opinion as to what the ruling of the Tennessee Supreme Court would be under the circumstances of the case. Such reasoning comes close to a reversion to pre-Erie federal common law analysis.

While involving a less generally applicable principle of Tennessee law, the Appellate Court's ruling on the "failure to repudiate" issue is an even more serious co-option of Tennessee's ability to define its own law. Under Tennessee law, the failure to repudiate a contract entered into under duress is a form of estoppel, and therefore, an affirmative defense which must be expressly asserted prior to trial, and certainly prior to judgment. Exum v. Washington Fire & Marine Ins. Co., 297 S.W.2d 805, 41 Tenn. App. 610 (Tenn. Ct. App. 1955), cert. denied (Tenn. 1956). By applying this defense at the appellate level, despite the defendant's clear failure to timely assert it at the trial level, the Court of Appeals has effectively held that it was not an affirmative defense. By declining to certify the issue to the Tennessee Supreme Court, the Court of Appeals denied the Tennessee Supreme Court the opportunity to reassert its own prior law, or to redefine its law if deemed appropriate.

Whatever analysis is made of the Sixth Circuit's denial of certification in the present case, it undeniably promotes state-federal forum shopping. Defendants in similar future cases will undoubtedly file removal petitions in order to ensure application of the three year statute of limitations, rather than risking state law application of the six year limitation, or to avoid strict definition of state law affirmative defenses. The Sixth Circuit's decision also potentially deprives the present petitioner of the benefit of a state right which, but for the accident of diversity jurisdiction, would have been granted it. If the Tennessee Supreme Court adopts the six year limitation in a future case similar in its facts to the present case, the failure of the Erie policy in this case will be apparent.

However, the above difficulties can be and should have been remedied without creating new ones, through the simple device of requiring deference to state certification procedures. If the Court of Appeals had granted the motion to certify in the present case, the Tennessee Supreme Court would have been given an opportunity to settle an admittedly unsettled and important principle of state law. It might have declined to do so, but merely giving it the opportunity would have partially satisfied the Erie policies. Instead, while recognizing that the Tennessee Supreme Court has not spoken clearly on the issue, the Sixth Circuit Court chose to speculate as to what that Court would do under the circumstances, relying upon other federal precedent.

This Court has in the past recognized the importance and efficacy of state certification procedures in resolving unsettled state law issues. In Lehman Brothers v. Schein, 416 U.S. 386 (1974), the Court remanded a case to the appellate court when the appellate court had denied certification, despite an absence of applicable state law. Although this Court was careful to state that certification remained a matter of "sound" Court of Appeal's discretion, the intent of Lehman was clearly to encourage the use of the certification procedure in order to accurately apply state law. Likewise, in Belloti v. Baird, 428 U.S. 132 (1976), this Court indicated that certification will be required when a state law interpretation is necessary as a predicate for determining the constitutionality of a state statute. While this Court has been understandably reluctant to require certification -- likening it, for example, to prescribing what legal research the circuit courts shall conduct - - the only objective factor the Court has been able to identify justifying the denial of certification of an unsettled state law issue is the cost of certification. See, Lehman Brothers v. Schein, *supra*.

The need for more effective use of the available certification procedures has become more apparent since the decision of this Court in Salve Regina College v. Russell, 111 S. Ct. 121 (1991). The issue presented in Salve Regina College was whether the Courts of Appeal should continue to apply a "rule of deference" to their review of district court determinations of state law in diversity cases arising within the state in which the district court sits. The majority of the Courts of Appeal, including the Sixth Circuit, had adopted such a rule, on the premise that district judges in such circumstances were more likely to be versed in the applicable state law than the Courts of Appeal judges, who did not deal with it on a day-to-day basis. See e.g., Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988) re'hng denied (1989).

However, this Court rejected the rule of deference, finding that it contravened important practical and policy considerations. This Court held

that Courts of Appeal must review state law issues in diversity cases *de novo*, and with the same independence as in their review of district court determinations of federal law. This Court reasoned that an appellate court was better equipped to make a comprehensive, probing examination of legal issues than a district court which was subjected to the day-to-day pressures of litigation. This Court further concluded that continued deference to district court decisions would tend to fracture interpretations of state law, on a district-by-district basis, in direct contravention of the Erie policy. Significantly, with respect to those instances where there is a divergence between the district court and the federal appellate court, the Court noted in footnote 4:

Of course, a question of state law usually can be resolved definitively ... if a certification procedure is available and is successfully utilized.

Salve Regina College, 111 S.Ct. at 1224.

The petitioner respectfully submits that the second shoe should now be dropped. Having rejected the rule of deference to district court interpretations of state law, and having transferred full responsibility for making such interpretations to the Courts of Appeal, this Court should now complete the implementation of the Erie policies, by adopting a rule requiring or encouraging Courts of Appeal to defer to the ultimate repositories of state law, the state courts of last resort, when they are requested to do so and when factors justifying state certification are present. Every reason exists for adopting such a rule, and there appears to be no apparent reason for not doing so.

The petitioner suggests two approaches to enhancing the efficacy of state law certification procedures. The first is a per se approach, which would require certification whenever a request is made, if the Court of Appeals finds that state law is so uncertain as to require a prediction as to what the state court of last resort would do under the circumstances, and if that uncertainty is manifested by a disagreement between the Court of Appeals judges and the district judge or between members of the Court of Appeals panel on the issue involved. Such a rule would have the advantage of requiring certification only when state law is truly unsettled, and Erie policies truly at risk, while leaving certification in the broad range of more routine cases to the "sound discretion" of the circuit courts. Since certification would require a crucial finding by the Court of Appeals, going to the essential need for state law interpretation, control of certification would still remain within the Court of Appeals. The only purpose of the rule would be to prevent the essentially irrational result of a federal court of appeals denying certification, despite its admission that existing state law

is ambiguous, and despite a demonstration of that ambiguity by a division of opinion among the federal judges involved. The benefits of such a rule are obvious, and it is difficult to see what its deficiencies might be.

A more deferential approach would be the "factors to be considered" analysis which the petitioner suggests as an alternative. Such an analysis would not impinge at all upon the discretion of the federal court of appeals, but would provide needed guidance for the uniform application of the certification procedures throughout the United States. The factors which the petitioner has suggested are taken from previous pronouncements of this court, and include: the degree to which existing state law is unsettled; whether that uncertainty is reflected in disagreements among the federal judges who are and have been called upon to decide the instant case; whether the district judge whose determination is disagreed with has experience (as the present district judge did) as a state court judge; and whether the additional cost of certification is significant as compared to the value of the judgment being reviewed (in this case, it obviously is not).

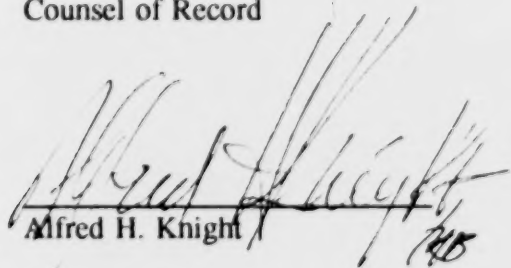
While the petitioner believes that the per se rule would be preferable, either would enhance the beneficial policies of state certification procedures and would minimize the possibility that the Erie principles would be abrogated. In the absence of such a rule, state supreme courts will continue to be denied full opportunity to shape and define the law applicable to federal diversity cases, as intended by the decision in Erie Railroad v. Tompkins.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted:

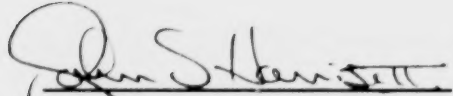
Counsel of Record

A handwritten signature in dark ink, appearing to read "Alfred H. Knight", is written over a horizontal line. To the right of the signature, the number "145" is handwritten.

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APPENDIX

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No. 90-5295

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CUMBERLAND & OHIO CO. OF
TEXAS, INC., the successor
corporation of Herbert Materials,
Inc.,

Plaintiff-Appellee,

v.

FIRST AMERICAN NATIONAL
BANK,

Defendant-Appellant.

ON APPEAL from the
United States District
Court for the Middle
District of Tennessee

Decided and Filed June 12, 1991

Before: KENNEDY and MARTIN, Circuit Judges; and
ENGEL, Senior Circuit Judge.

ENGEL, Senior Circuit Judge. First American National Bank ("the Bank") appeals a jury verdict rendered against it in this contract action. The plaintiff-appellee is Cumberland & Ohio Co. of Texas, ("the Company") which was known as Herbert Materials, Inc. at the time it contracted with the Bank. The Company's complaint raised claims based upon fraudulent and negligent misrepresentation, breach of contract, and

breach of fiduciary duty under Tennessee law. The case was tried before a jury in September 1989, and a \$6 million judgment was entered in favor of the Company. We now reverse the judgment, concluding that the statute of limitations had run on all of the Company's claims. In addition, we find that the Company had executed a valid waiver and release in favor of the Bank, precluding the Company's suit even had the action been timely filed.

The Company, which was based in Nashville, manufactured and sold bricks and building materials. In 1981, the Company established a \$2.5 million working capital loan or line of credit with the Bank. Such loans are generally extended to borrowers who lack liquid assets, and they are usually made in the form of demand notes secured by the borrower's inventory and accounts receivable. At the time, the Company's overall debt exceeded \$10 million, and the Bank asked for and received significant power to control the future business plans of the Company, apparently in order to ensure that the Company would survive and continue to meet its financial obligations to the Bank.

Among the changes the Bank sought in the Company's operation was the disposition of some of the Company's unprofitable divisions. The Company contends that it planned to sell off some of its assets, but not as quickly as the Bank wanted. Lending contracts signed by the Bank and the Company in July and August of 1981 gave the Bank the right to demand immediate and full payment of the \$2.5 million loan and all other loans between the parties if the Company missed a payment or if the "Bank reasonably deem[ed] itself to be insecure" regarding the Company's ability to repay the loans. The documents also state that "All amounts advanced to Borrower are payable ON DEMAND." Any right of the Company to notice before the Bank demanded payment was "expressly waived." There was also a provision indicating that "in the absence of default; no demand for full payment of the Accounts Receivable and Inventory Loans will be made

on or before thirteen months from the date of the Master Loan Agreement."

In late September 1982, after the 13-month period had run, the Bank sent a letter to the Company expressing its view that the Company was in default as defined in the loan agreement, and that the entire amount was then due. The Bank was not satisfied that the Company had reduced its inventory and assets to the extent required under the parties' loan agreement. The Bank also concluded that the Company had failed to secure sufficient additional capital for ongoing operations.

The Company disputed the Bank's allegations of default. Further negotiations between the parties resulted in a resumption of the line of credit to the Company in October 1982, provided the Company would obtain additional capital by the end of the year and would continue to sell some of its property and affiliates.

The Company indicated in early 1983 that it was considering legal action against the Bank for the Bank's 1982 demand for full payment. The Company believed the Bank was letting it "bleed to death" by limiting its access to additional working capital, and by holding liens on the Company's collateral, whereas the Bank thought its actions were justified to ensure that the loans remained sufficiently collateralized and that the Company survive.

In January 1983, the Company asked that the collateral be released so that the working capital loan could be removed to another bank. Further discussions between the Company and the Bank led to the Bank's agreement to make a further loan to the Company in exchange for the Company's agreement to sell more property and to assign some notes payable to the Bank. In addition, the Bank sought a "waiver and release" from the Company which would release the Bank from any liability which the Company claimed the Bank owed for "breaching" the working capital loan agreement in 1982 by demanding immediate full payment of the loan. After several more

months of discussions within the Company's board of directors and with the Bank, the Waiver and Release was signed by the Company and its shareholders in July 1983. It absolved the Bank from any liability whatsoever arising out of transactions made before that date. A similar release in favor of the Company was signed by the Bank at the same time. After the releases were signed, the Company transferred its line of credit to another bank, paid off the loans owed to the Bank, and terminated its relationship with the Bank in 1983.

In August 1988, the Company filed suit against the Bank in Tennessee Chancery Court, and the action was removed to federal court in September 1988. The Company claimed that it suffered losses of between \$5 million and \$7 million because the Bank's "financial pressures and arbitrary deadlines" forced the Company to sell off valuable assets at deep discounts. The Company alleged that it signed the Waiver and Release under economic duress because purchasers of the Company's assets wanted the Bank's liens removed, and the Bank would only remove them after the Company signed the Waiver. The jury awarded the Company \$6 million, and the Bank filed a timely notice of appeal.

I.

This court must review de novo the district court's determinations of state law. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1221 (1991). The parties agree that Tennessee law applies to the contracts and actions at issue before us. The district court determined that a six-year statute of limitations period applied, so that the Company's suit, initiated five years after the alleged breaches of contractual and fiduciary duties, was timely. We disagree.

Tennessee's statute of limitations period is three years for injuries to personal or real property. Tenn. Code Ann. (T.C.A.) § 28-3-105. The six-year limitations period applies to "actions on contracts not otherwise

expressly provided for" in the Tennessee code. T.C.A. § 28-3-109. The three-year limitations period applies when a defendant has allegedly breached his contract, causing injury to the personal or real property of the plaintiff. See *Pera v. Kroger Co.*, 674 S.W.2d 715, 719-20 (Tenn. 1984).

The distinctions between Tennessee's three- and six-year limitations periods are illustrated in *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977) and *Harvest Corp. v. Ernst & Whinney*, 610 S.W.2d 727 (Tenn. App. 1980). We observe initially that decisions of a state's highest court, where applicable, must control over any conflicting opinions of an intermediate state appellate court. We need not rely wholly upon this principle here for, in all events, we find that the facts of the case before us are closer to those of *Vance* than to those of *Harvest Corp.*, and compel our conclusion that the three-year limitations period applied in *Vance* must apply here as well.

The district court relied upon *Harvest Corp.*, which applied the six-year limitations period to a contract action alleging economic injury. In *Harvest Corp.*, the plaintiff corporation sought damages from its accountants, alleging that the defendants' negligence had caused the corporation to overpay when it acquired another company's inventory. The *Harvest* court determined that the plaintiff corporation, which was the *buyer* of property, did not suffer an injury to its personal or real property because at the time the accountants estimated the value of the company to be acquired, the plaintiff corporation did not own the property at issue. "The defendants' alleged breach of contract occurred through their misstatement of said property's value." *Harvest Corp.*, 610 S.W.2d at 730. This allegedly negligent misstatement did not affect the value of property then owned by the plaintiff corporation, so the corporation suffered money damages but not injury to its property.

In *Vance*, however, the Tennessee Supreme Court applied the shorter limitations period to an action in which the plaintiff alleged that the defendants' fraudulent misrepresentations had induced him to sell his stock for less than its value. The defendants were corporate directors who understated to a shareholder the value of an outsider's purchase price for the company's assets. The shareholder sold his stock, receiving in return roughly half the money actually paid by the buyer for the shares. The defendant directors allegedly kept the rest of the buyer's payment for themselves. The court concluded that T.C.A. § 28-3-105's three-year limitations period should apply. "We reject the notion that injury to property as contemplated therein is limited to physical injury to property. In our opinion, the loss in value sustained by plaintiff from the alleged tort of fraud and deceit is included within the phrase, 'injuries to personal property'[,]". *Vance*, 547 S.W.2d at 932.

In our case, the Company alleges that its property has been injured economically, in much the same way that the *Vance* plaintiff was injured by selling his stock. All damages claimed by the Company were incurred when it was allegedly forced by the Bank to quickly dispose of unprofitable assets, and was unable to complete the sell-off in a careful and economically beneficial manner. While the intrinsic value of the property sold by the plaintiff in *Vance* and the property sold by the Company in this case may have been unchanged by the actions of the defendants in the two suits, the lost value of the *Vance* plaintiff's stock at the time he sold it was found to be an injury to his property. The same may be said of the allegedly depressed market price obtained by the Company for its assets sold in the early 1980s. In both *Vance* and our own case, a seller contended that he did not receive as much for his stock or assets as he would have absent the defendants' alleged wrongdoing. In Tennessee, actions for injuries to personal or real property must be brought within three years after the alleged damages. The Company's action filed nearly six years after the Bank's demand for payment and allegedly

improper demand for a disposition of some Company assets was time barred.

In Tennessee, "the gravamen of an action, rather than its designation as an action for tort or contract, determines the applicable statute of limitations." *Pera v. Kroger Co.*, 674 S.W.2d 715, 719 (Tenn. 1984). In *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1272 (7th Cir. 1990), the court applied Tennessee's three-year statute of limitations, noting that the "difference between the action brought in *Vance* and that which is presented for our review today is that UST has alleged 'economic duress' rather than 'deceit.' This, however, is a distinction without meaning in the specific context of determining the appropriate limitations period under Tennessee law." In our case, the gravamen of the action was an alleged economic injury to the Company when property was sold at a loss. We agree with the Seventh Circuit that Tennessee's highest court would impose a three-year limitations period on such economic duress claims where the plaintiff seeks damages for alleged injuries to its property.

II.

While we conclude that the statute of limitations defense is complete, and compels reversal as a matter of law, we find a co-equal reason for reversal in our conclusion that the Waiver and Release signed by the Company in July 1983 barred any legal action brought by the Company for alleged liability arising before that date. There seems to be little dispute that the Company's waiver of any right to sue the Bank was supported by consideration, since the Bank signed a similar waiver in favor of the Company, and the Bank extended additional credit to the Company as part of the 1983 negotiations between the parties.

However, the Company contended at trial that it signed the Waiver and Release under economic duress, and therefore should not be bound by its terms. Economic duress has been defined as "imposition, oppression, undue

influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another[.]" *Crocker v. Schneider*, 683 S.W.2d 335, 338 (Tenn. App. 1984) (citation omitted). The alleged coercive event must be of such severity, either threatened, impending or actually inflicted, so as to overcome the mind and will of a person of ordinary firmness. *Fogg v. Union Bank*, 63 Tenn. [4 Baxter] 530, 535 (1874). While we question the jury's finding that the Company signed the waiver under duress, given the length of time over which the Company's directors and legal counsel considered the issue, we conclude that in any event the Company's failure to repudiate the Waiver and Release until five years after its relationship with the Bank ended now bars any attempt by the Company to avoid the terms of the Waiver as a matter of law.

A contract signed under economic duress is voidable by the victim, not void. Restatement (Second) of Contracts §§ 175 & comment d, 176 & comment a (1981). See *In re McNeil*, 22 B.R. 408, 414 (Bkrtcy. E.D. Tenn. 1982) ("A contract or other instrument is voidable under Tennessee law on the basis of duress. . ."); *Blair v. Coffman and Blackburn*, 2 Tenn. [2 Overt.] 176, 177 (1812) ("The matter of fact which would invalidate voidable acts must always be pleaded; hence the necessity of this course as to duress."). This is distinguished from duress by physical compulsion, which renders a contract void. No allegations of physical duress have been raised by the Company.

In general, a party seeking to avoid a contract induced by economic duress must act promptly upon removal of the duress to avoid the contract. *DiRose v. PK Management Corp.*, 691 F.2d 628, 633-34 (2d Cir. 1982). In Tennessee, a party who chose to perform under a written agreement for nearly two years was found to have ratified it, and was estopped from claiming economic duress to avoid the agreement's terms. *Crocker v. Schneider*, 683 S.W.2d 335 (Tenn. App. 1984). Generally, where the contract is a Waiver and Release,

the releasor who retains the consideration after learning that the agreement is voidable has effectively ratified the release and may not later avoid its terms. *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991).

In this case, the Waiver and Release was signed by the Company in 1983. Not until the law suit was filed in 1988 did the Company repudiate the waiver and raise the duress argument. The lending relationship between the Bank and the Company had ended five years earlier. No letter or other document from the Company during those five intervening years suggested that it felt it had been subjected to duress. As noted above, a party who for twenty-two months after the alleged economic duress chose to abide by the terms of his agreement and retain the consideration was thereby estopped from claiming duress under Tennessee law. *Crocker*, 683 S.W.2d at 340. In our case, the Company's five-year failure to take any affirmative steps to repudiate the allegedly voidable contract bars its present argument that the waiver was not effective when the Company finally brought suit against the Bank in 1988.

III.

We conclude that the Company's suit was barred by the applicable Tennessee statute of limitations, as well as by the Waiver and Release which even if voidable, was not timely repudiated. As a result, we need not consider the Bank's further arguments that the Company breached the terms of the loan agreement, or that the district court improperly instructed the jury at trial. The judgment of the district court is REVERSED, and the case remanded for entry of judgment in favor of First American National Bank.

UNITED STATES FOR OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

CUMBERLAND & OHIO CO. OF TEXAS, INC., the successor
corporation of Herbert Materials Inc.

Plaintiff - Appellee

v.

FIRST AMERICAN NATIONAL BANK

Defendant - Appellant

BEFORE: KENNEDY AND MARTIN, Circuit Judges; ENGEL, Senior
Circuit Judge

Upon consideration of the appellee's motion to certify questions of
law, and further considering the appellant's response in opposition,

It is **ORDERED** that the motion be and it hereby is **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

[entered July 23, 1991]

No. 90-5295

UNITED STATES FOR OF APPEALS
FOR THE SIXTH CIRCUIT

CUMBERLAND & OHIO CO. OF TEXAS, INC., the successor
corporation of Herbert Materials Inc.

Plaintiff - Appellee

v.

ORDER

FIRST AMERICAN NATIONAL BANK

Defendant - Appellant

BEFORE: KENNEDY AND MARTIN, Circuit Judges; ENGEL, Senior
Circuit Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

[entered August 14, 1991]

**CUMBERLAND & OHIO CO.
OF TEXAS, INC., the
successor corporation
of HERBERT MATERIAL
INCORPORATED**

DOCKET NO. 3-88-0784

**FIRST AMERICAN BANK
OF NASHVILLE**

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that upon the jury's verdict for the plaintiff, compensatory damages are awarded against First American Bank in the amount of \$6,000,000.00

Thereupon the jury was polled and each juror affirmed the verdict as being his or her individual verdict.

September 29, 1989

Date _____

Juliet Griffin

Clerk

/s/ Mary Conner

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CUMBERLAND & OHIO CO,
OF TEXAS, INC., the
successor corporation
of HERBERT MATERIAL
INCORPORATED

VS.

FIRST AMERICAN BANK
OF NASHVILLE

DOCKET NO. 3-88-0784

BENCH MEMORANDUM

Defendant First American Bank has presented a motion in limine on the grounds that several of plaintiff's claims are barred by Tennessee's statutes of limitations and evidence relating to those claims is thus irrelevant.

Plaintiff has claimed that it entered into a contract with First American Bank on August 13, 1981 and that First American subsequently breached its contractual and fiduciary duties by failing to perform in good faith and by failing "to give notice of a substantial change in the relationship." Plaintiff has also claimed that the defendant misrepresented facts "affecting the plaintiff in its business." Plaintiff has alleged that as a result of the above acts, plaintiff suffered operating losses and was forced to dispose of inventory and assets at below market prices.

Tennessee Code Annotated section 28-3-109 provides for a six year statute of limitation for "actions on contracts not otherwise expressly provided for" in the code. Among the other statute of limitation provisions within the Tennessee Code, section 23-3-105, expressly provides that "actions for injuries to personal or real property" must be commenced within three years of the cause of action.

In applying these sections, the Tennessee courts have found the six year statute of limitations to be applicable to a claim only if the claim was truly based in contract and not tort, and if the damages alleged were not to persons or property. Thus in Budget Rent-a-Car of Knoxville, Inc. v. Car Services, Inc., 469 S.W.2d 360 (1971), where the plaintiff claimed the tort of conspiracy, the Tennessee Supreme Court applied a three year statute of

limitations, even though plaintiff suffered only monetary, not property damages.

In Williams v. Thompson, 443 S.W.2d 447 (Tenn. 1969), the Supreme Court applied the three year statute of limitations where the action admittedly arose in contract but the damage was done to plaintiff's real property.

In Vance v. Schulder, 547 S.W.2d 927 (1977), the Supreme Court again applied the three year statute of limitations where the plaintiff's monetary damages resulted from the defendant's alleged tort of fraud.

In Harvest Corp. v. Ernst & Whinney, however, the Tennessee Court of Appeals applied the six year statute of limitations where defendants' poor performance of their contractual obligations resulted in the plaintiffs paying an excessive price for a business acquisition. 610 S.W.2d 727 (Tenn. App. 1980), cert. denied (Tenn. Nov. 10, 1980).

In the present case, the plaintiff has alleged that it incurred monetary losses in selling its inventory and assets at below market price. Plaintiff has not alleged that the defendant injured its property, but that defendant's actions forced plaintiff to suffer operating losses and to sell its property under such time pressures that plaintiff received less money than it would have otherwise received for the sale. The inherent value of the property remained the same. As the Court of Appeals found under similar circumstances in Harvest Corp., "such money damages do not constitute damage to property."

The Court also finds that plaintiff has presented claims lying in contract and not tort. Plaintiff's losses are alleged to have resulted from defendant's allegedly bad faith performance of the contract. Plaintiff has not sought to recover on the ground that defendant's bad faith amounted to conspiracy or fraud, but that defendant's performance breached the contract's implied covenant of good faith. Accordingly, the Court finds that these claims are properly characterized as "actions on contracts" and are thus governed by the six year statute of limitations prescribed in Tennessee Code section 28-3-109.

Plaintiff has also claimed, however, that defendant breached its fiduciary duty. Breach of fiduciary duty is tortious conduct. Restatement of Torts.2d, § 874. Accordingly, plaintiff's breach of fiduciary duty claim is barred by the three year statute of limitations set out in Tennessee Code section 28-3-105, and evidence in support of that claim is thus irrelevant.

The Court notes that the plaintiff has also alleged that the defendant misrepresented facts in their negotiations. Evidence of these misrepresentations may be admitted to prove defendant's alleged bad faith, but will not be admitted to support a claim of fraud in the inducement, since the tort of

fraud is governed by the three year statute of limitations set out in Tennessee Code section 28-3-105.

[filed September 27, 1989]

RULE 23. CERTIFICATION OF QUESTIONS OF STATE LAW FROM FEDERAL COURT

Table of Sections

Section

1. When Certified.
2. Method of Invoking Rule.
3. Contents of Certification Order.
4. Preparation of Certification Order; Notice of Filing.
5. Record.
6. Parties.
7. Briefs and Arguments.
8. Opinion.
9. Dismissal of Certification.
10. Costs.

Section 1. When Certified

The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

Section 2. Method of Invoking Rule

This rule may be invoked upon the issuance of a certification order by any of the courts referred to in Section 1 of this rule.

Section 3. Contents of Certification Order

The certification order shall contain:

- (A) The style of the case;
- (B) A statement of facts showing the nature of the case, the circumstances out of which the question of law arises, the question of law to be answered, and any other information the certifying court deems relevant to the question of law to be answered;
- (C) The names of each of the parties;
- (D) The names, addresses, and telephone numbers of counsel for each party; and

- (E) A designation of one of the parties as the moving party.

Section 4. Preparation of Certification Order; Notice of Filing

The certification order shall be prepared by the certifying court and signed by any judge or justice presiding over the cause. The clerk of the certifying court shall serve copies of the certification order upon all parties or their counsel of record and file with this Court the certification order, under seal of the certifying court, along with proof of service.

Section 5. Record

This court may require the original or copies of all or any portion of the record before the certifying court.

Section 6. Parties

The party designated by the certifying court as the moving party shall be referred to as the petitioner and the party adverse to the petitioner shall be referred to as the respondent.

Section 7. Briefs and Arguments

(A) The brief of the party designated by the certifying court as the moving party shall be filed and served within twenty days of the filing with the Supreme Court of the certification order. The brief of the adverse party shall be filed within twenty days thereafter, and a reply brief may be filed within ten days thereafter.

(B) Oral arguments will not be permitted unless ordered by the Court, on its own motion or upon application of a party.

Section 8. Opinion

The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of this Court to the certifying court and to the parties or their counsel.

Section 9. Dismissal of Certification

If the Court, in the exercise of its discretion declines to answer any or all of the questions of law certified to it, an order of the Court shall be sent to the certifying court and to all parties or their counsel.

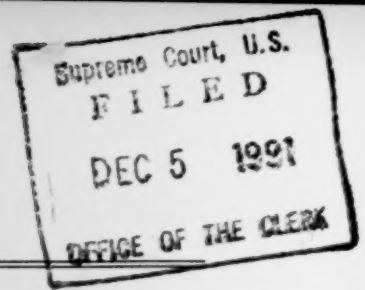
Section 10. Costs

Costs incident to the proceedings in the Supreme Court of Tennessee shall be taxed in accordance with the Tennessee Rules of Appellate Procedure.

[Adopted effective February 17, 1989.]

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No. 91-800



In The
Supreme Court of the United States
October Term, 1991

CUMBERLAND & OHIO CO. OF TEXAS, INC.,
Petitioner,
v.

FIRST AMERICAN NATIONAL BANK,
Respondent.

Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

ROBERT J. WALKER
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QUESTIONS PRESENTED

Should this Court limit the discretion of the federal courts of appeals in deciding when to certify questions of state law to state supreme courts, either by mandating circumstances under which those courts must seek certification or by mandating factors those courts must consider each time a party requests certification?

Does a federal court of appeals have the discretion to decline to certify questions of law to a state supreme court when the party requesting certification delayed its request for certification until after the court of appeals, in a unanimous opinion, had rendered a decision against the party on the merits of the questions, when ample precedent from the supreme court of the state at issue supported the decision, and when one of the issues requested to be certified was a federal, rather than state, procedural question?

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17A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4248, at 173 (1988) 12

STATEMENT OF THE CASE

On August 17, 1988, Petitioner Cumberland & Ohio Company of Texas, Inc. ("Petitioner"), the successor corporation of Herbert Materials Incorporated, filed suit in the Chancery Court of the State of Tennessee, Twentieth Judicial District, Davidson County. The complaint charged Respondent First American National Bank¹ ("First American" or "the bank") with, among other things, fraudulent and/or negligent misrepresentation, breach of fiduciary duty, violation of the federal bank tying act (12 U.S.C. §§ 1971 *et seq.*), and violation of the contractual duty of good faith and fair dealing. The allegations arose out of a lending relationship that existed between the parties from mid-1981 to mid-1983, five to seven years prior to the filing of Petitioner's complaint. First American removed the case to the United States District Court for the Middle District of Tennessee on September 15, 1988. Contrary to the assertion in the Petition for Writ of Certiorari ("Petition"), First American did not remove the case on the ground of diversity of jurisdiction. (Petition at 3, 7). Rather, although diversity existed, First American removed the case pursuant to 28 U.S.C. § 1331 (federal question) on the ground that the district court had subject matter jurisdiction because of the bank tying act claim. *See* Petition for Removal (Respondent's Appendix 1-2).

The case was tried before a jury beginning on September 5, 1989. The only claims submitted to the jury

¹ First American National Bank's parent company is First American Corporation. Sup. Ct. R. 29.1.

were Petitioner's theories of breach of the loan agreements and breach of the contractual duty of good faith and fair dealing in the enforcement and performance of the loan agreements. All other claims were dismissed as untimely either by the district court under Tennessee's three-year statute of limitations (Tenn. Code Ann. § 28-3-105 (Petition at 2)) in response to the bank's motion *in limine*, or by the Petitioner at its own instance. (See, e.g., Petition at 14a-15a).

On September 26, 1989, at the close of all the proof, First American moved for a directed verdict. The bank asserted, among other things, that Petitioner's claims had been extinguished in July 1983 when Petitioner, with the advice and assistance of counsel, executed and exchanged mutual waivers and releases of liability with First American. First American also reasserted that Petitioner's claims were barred by the three-year statute of limitations. The district court denied the directed verdict motion insofar as it was based on the statute of limitations and reserved decision on the remaining grounds. On September 28, 1989, the jury returned a general verdict against First American in the amount of six million dollars.

On October 11, 1989, First American timely filed a motion for judgment notwithstanding the verdict, for new trial or for remittitur, based on, among other grounds, the defenses of the three-year statute of limitations and the execution of the mutual waivers and releases. Contrary to the statements in the Petition, the bank had asserted the waiver and release as a defense throughout the litigation. Thus, the release issue was timely raised in this motion. On January 17, 1990, without

stating any grounds for its decision, the trial court entered a one sentence order denying the bank's motion.

First American timely appealed to the United States Court of Appeals for the Sixth Circuit. The bank urged the court to reverse the district court, based on, among other grounds, the defenses of the expiration of the statute of limitations and the execution of a waiver and release.

On June 12, 1991, in a unanimous opinion the Sixth Circuit reversed the district court, agreeing that the applicable statute of limitations barred Petitioner's claims and that Petitioner's execution of a waiver and release in 1983 precluded it from seeking damages from First American in its 1988 suit.

The Sixth Circuit based its statute of limitations holding on consideration of two statutes (Tenn. Code Ann. §§ 28-3-105 and 28-3-109), the Tennessee Supreme Court's opinions in *Vance v. Schulder*, 547 S.W.2d 947 (Tenn. 1977), and *Pera v. Kroger Co.*, 674 S.W.2d 715 (Tenn. 1984), and the Seventh Circuit's analysis in *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261 (7th Cir. 1990). Relying primarily on the Tennessee Supreme Court's opinion in *Vance v. Schulder*, the Sixth Circuit held that Tennessee's "three-year limitations period [Tenn. Code Ann. § 28-3-105] applies when a defendant has allegedly breached his contract, causing injury to the personal or real property of the plaintiff." Opinion of the Sixth Circuit at 5 (Petition at 5a). Because the court of appeals found that Petitioner's claim for breach of contract involved injury to personal or real property, it concluded

that the claim was barred by the three-year statute. Opinion of the Sixth Circuit at 6-7 (Petition at 6a-7a).

The court of appeals declared that the six-year statute of limitation (Tenn. Code Ann. § 28-3-109) urged by Petitioner did not apply because that statute applies only to "actions on contracts not otherwise expressly provided for" in the Tennessee code. The Sixth Circuit found no conflict between its analysis and the decision upon which Petitioner based its argument, *Harvest Corp. v. Ernst & Whinney*, 610 S.W.2d 747 (Tenn. Ct. App. 1980). However, the court noted that even if the Tennessee Court of Appeals' holding in *Harvest Corp.* had conflicted with the two Tennessee Supreme Court opinions, the latter opinions would control. Opinion of the Sixth Circuit at 5 (Petition at 5a).

As an independent, alternative basis for its ruling, the Sixth Circuit declared that Petitioner's execution of a waiver and release in 1983 barred it from asserting claims against First American in 1988. Opinion of the Sixth Circuit at 7-9 (Petition at 7a-9a). In so holding, the court rejected Petitioner's contention that it should be excused from enforcement of the waiver and release on the ground of economic duress. The court ruled that Petitioner was precluded from avoiding the release because it failed to repudiate the waiver and release for more than five years after the document was signed and because it retained the many benefits of the settlement.

Only after the Sixth Circuit issued this adverse opinion did Petitioner move the court of appeals to certify to the Tennessee Supreme Court the questions of which statute of limitations applied and whether First American

had not properly pled Petitioner's failure to repudiate the waiver and release. At that time Petitioner also petitioned for a rehearing and suggested a rehearing en banc. On July 23, 1991, the Sixth Circuit denied the Motion to Certify. On August 14, 1991, the Sixth Circuit denied the Petition for Rehearing as well.

REASONS FOR DENYING WRIT

Summary of Argument

The sole basis upon which Petitioner seeks review by this Court is the failure of the Sixth Circuit to certify the statute of limitations and procedural pleading issues to the Tennessee Supreme Court. There is no justification or need for this Court to impose upon the federal courts of appeal the inflexible standards for certification that Petitioner urges. Petitioner's proposals would prove unduly restrictive, unworkable and burdensome upon the federal courts of appeals and state supreme courts.

Furthermore, the Sixth Circuit acted correctly in denying the certification request in this case because the issues for which Petitioner sought certification were not state law claims for which there was no controlling precedent, as required under the Tennessee Supreme Court certification rule. *See Tenn. Sup. Ct. R. 23.*

Finally, denial of the Petition is particularly appropriate in this case because Petitioner is seeking to obtain certification of issues that it had not contended were uncertain, requiring state court assistance, until after it had received an adverse decision by the court of appeals.

Argument

1. **This Court Should Deny the Petition Because the Procedure and Standards for Certification that Petitioner Urges this Court to Adopt Would Unduly and Unnecessarily Restrict the Discretion of the Courts of Appeal, and Would Be Burdensome on Both Federal and State Courts.**

This Court should not grant a writ of certiorari to consider issuing guidelines for certification as Petitioner urges because there is no conflict among federal circuits as to criteria for certification, no need for guidance by this Court and no other condition that meets the standards for granting review pursuant to Sup. Ct. R. 10. This Court fully and completely addressed the issue of certification in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).

In *Lehman Brothers*, the Court declined to do what Petitioner now requests, that is, to adopt inflexible requirements or standards as to when a federal court of appeals must or should certify a question. Rather, it left these decisions to the sound discretion of the courts of appeals:

[T]he mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit. We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.

416 U.S. at 390-91. In fact, the concurring opinion in *Lehman Brothers* stressed the problems that would result were this Court to adopt, as suggested by Petitioner, stringent standards as to certification:

But a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we go slowly in telling the courts of appeals or the district courts how to go about deciding cases where federal jurisdiction is based on diversity of citizenship, cases which they see and decide far more often than we do.

* * *

While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court.

416 U.S. 393, 394.

The mistrust that Petitioner apparently holds for federal courts of appeals and their competence is unfounded and stands in opposition to the vote of confidence this Court provided to those judges in *Lehman Brothers*, and more recently in *Salve Regina College v. Russell*, 113 L. Ed. 2d 190 (1991). In *Salve Regina College*, this Court expressly held that federal courts of appeals are in a better position than district courts to decide issues of law, including issues of state law:

District judges preside alone over fast-paced trials: of necessity they devote much of their energy and resources to hearing witnesses and

reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and brief. Thus, trial judges often must resolve complicated legal questions without benefit of "extended reflection [or] extensive information."

* * *

Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues.

113 L. Ed. 2d at 198 (citations omitted).

Petitioner advances two reasons why this Court should abandon the views it expressed in *Lehman Brothers* and *Salve Regina College* and consider Petitioner's proposed certification standards. First, Petitioner argues that the Sixth Circuit erroneously decided the merits of the two issues for which Petitioner sought certification. (Petition at 7). Petitioner's belief that the Sixth Circuit erred does not justify completely removing, or even limiting, the discretion of all federal courts of appeals as to when or whether to grant certification.

Second, Petitioner argues that the standards it proposes are necessary to effectuate the policies of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). However, the Sixth Circuit in this case has in no sense encouraged forum-shopping in diversity cases in violation of *Erie*. First

American did not remove the case on the basis of diversity, but on the existence of a federal question. Moreover, the Sixth Circuit's opinion does not conflict with any opinion of the Tennessee Supreme Court and accordingly will not promote forum-shopping.

The standards that Petitioner urges this Court to adopt for certification would be unworkable, would result in even further delays for litigants making their way through the federal courts and would burden both the federal and state court systems. Petitioner first proposes that this Court *require* all federal courts of appeals to certify every state law issue presented to them if the state law on the issue is "uncertain" and there is a disagreement among the members of the court of appeals panel or, as in this case, between the district court and the court of appeals. In other words, a court of appeals could never reverse a district court on any issue of state law that qualifies as "uncertain" without first seeking certification from the state supreme court. This standard would burden both federal and state courts without serving any legitimate interests. As this Court recognized in both *Lehman Brothers* and *Salve Regina College*, the judges on the federal courts of appeals are more qualified and competent to decide issues of state law, even if, in doing so, they reach a different conclusion than the district court.

Alternatively, Petitioner requests that this Court require federal courts of appeals to apply certain enumerated factors whenever a party seeks certification. The assumption underlying this request – that the federal courts of appeals, and the Sixth Circuit in particular, do not currently consider all issues presented to them fully

and competently, including requests for certification – is not only unwarranted but is contrary to the views that this Court expressed in *Lehman Brothers* and *Salve Regina College*.

Petitioner presents absolutely no support, legal, logical, or practical, for the factors that it suggests a federal court of appeals should be required to consider. These factors are:

Whether state law is so uncertain as to require a prediction as to what the state court of last resort would rule under the circumstances; whether there is disagreement as to the applicable state law either within the appellate panel or between the appellate judges and the district court judge; the relative experience of the appellate and district court judges in resolving issues under the applicable state law; and the significance of the additional cost involved in certifying the question, considering the monetary amount of the judgment being reviewed and other relevant factors.

Petition at 6. Not only does Petitioner provide no support or reason for any of these factors, but many of them are clearly inappropriate, inapplicable or both. For example, there is no indication in this case that there was a disagreement within the appellate panel to deny the Motion to Certify. Similarly, deference by the courts of appeal to district court decisions on legal issues was rejected by this Court in *Salve Regina College*. Contemplation of the monetary amount of the judgment awarded would subordinate rules of law and constitutional principles to questions of wealth.

This Court should reject the Petition because there is no reason justifying adoption of any new standard for certification. *Lehman Brothers* provided federal courts with adequate guidance as to certification in the federal system, and Petitioner has not cited any evidence that those courts are unable to follow, or are not following, the dictates of *Lehman Brothers*.

2. This Court Should Deny the Petition Because the Issues on Which Certification Was Sought Did Not Satisfy Federal or Tennessee Standards for Certification.

Certification was not appropriate in this case either under current federal standards or under the Rules of the Tennessee Supreme Court. First, the issues for which Petitioner sought certification were not uncertain issues under Tennessee law, and thus were not of the type that federal courts do or should certify. Courts have consistently held that certification is not "to be routinely invoked whenever a federal court is presented with an unsettled question of state law." *Armijo v. ExCam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *see also Tidler v. Eli Lilly and Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) ("Where the applicable state law is clear, certification is inappropriate; it is not a procedure by which federal courts may abdicate their responsibility to decide a legal issue when the relevant sources of state law available to it provide a discernible path for the court to follow."); *Perkins v. Clark Equipment Co.*, 823 F.2d 207, 209 (8th Cir. 1987) (citations omitted) ("Absent a 'close' question and lack of state sources, enabling a nonconjectural determination, a federal court should not avoid its responsibility to determine

all issues before it.' "); 17A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4248, at 173 (1988) ("Questions ought not to be certified if the answer is reasonably clear."). This Court has stressed that "[t]he mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." *Lehman Brothers*, 416 U.S. at 390. Certification should be granted only in exceptional circumstances when a federal court foresees difficulty in resolving an issue of state law. The instant suit is not such a case.

Second, certification would not have been appropriate under the Tennessee Supreme Court Rule governing certification. That rule expressly requires that an issue be one for which there is no controlling precedent:

The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and *as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Tennessee.*

Tenn. Sup. Ct. R. 23⁷ (emphasis added). As the Sixth Circuit recognized in this case, the Tennessee Supreme Court had addressed the issue of which statute of limitations applies to a claim alleging a plaintiff has incurred damage to its property on at least two prior occasions. See Opinion of the Sixth Circuit at 5-7 (Petition at 5a-7a); *Pera v. Kroger Co.*, 674 S.W.2d 715, 719-20 (Tenn. 1984); *Vance v.*

Schulder, 547 S.W.2d 927 (Tenn. 1977). In addition, as the Sixth Circuit noted, the Seventh Circuit had interpreted the Tennessee statutes of limitations in a similar manner. See *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1272 (7th Cir. 1990). Accordingly, the statute of limitations issue did not present a unprecedented question of law that would have justified the certification of that issue to the Tennessee Supreme Court.

The issue of the alleged failure to plead an affirmative defense likewise is not without precedent. See, e.g., *Hixson v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1973); *Ottenheimer Publishers, Inc. v. Regal Publishers, Inc.*, 626 S.W.2d 277, 279 (Tenn. Ct. App.), *perm. app. denied* (Tenn. 1981). In fact, Petitioner does not claim this issue is uncertain requiring state court guidance. Instead, Petitioner merely contends that the Sixth Circuit erroneously applied existing Tennessee law. See Petition at 7 (citing *Exum v. Washington Fire & Marine Insurance Co.*, 41 Tenn. App. 610, 197 S.W.2d 805 (1955)). Certification is not designed or intended to provide litigants an automatic second chance at appellate review of state law issues in the federal system.

In any event, the Sixth Circuit was correct in ignoring Petitioner's repudiation argument based on Tennessee law. The issue of which affirmative defenses must be pled and what constitutes an affirmative defense are procedural issues to be determined under federal, not state law. See, e.g., *Sayre v. Musicland Group, Inc.*, 850 F.2d 350, 352-54 (8th Cir. 1988). Further, the execution of the waiver and release, not the subissue of repudiation of the waiver and release, was the affirmative defense that was required to be, and was, pled. See Fed. R. Civ. P. 8(c); see

also Tenn. R. Civ. P. 8.03; *Ottenheimer Publishers*, 626 S.W.2d at 279.

In any event, First American more than adequately provided Petitioner with notice of its failure to repudiate. The bank's Answer asserted the waiver and release as a defense to all of Petitioner's claims. The issue of repudiation was then specifically raised in First American's trial brief, at the directed verdict stage, in proposed jury instructions, and in its post-trial motion and memorandum. Thus, the Sixth Circuit was well within its discretion in deciding not to certify to the Tennessee Supreme Court the procedural question of whether it had correctly interpreted the pleadings in the record on appeal.

Finally, Tenn. Sup. Ct. R. 23 confers absolute discretion upon the Tennessee Supreme Court to accept or reject a request for certification. Had Petitioner's two issues come within the Rule's requirements, and had the court of appeals certified both issues, the Tennessee Supreme Court would have had no obligation to accept review.² Particularly in light of the lack of merit in Petitioner's request, the Sixth Circuit acted correctly in rejecting the request because certification would merely

² Because the expiration of the statute of limitations and the execution of the waiver and release were alternative grounds for reversal of the lower court's ruling, the Tennessee Supreme Court would have had to accept certification of *both* issues in order to affect the court of appeals' holding. Further, the court of appeals noted that it did not consider additional grounds for reversal due to its ruling on the statute of limitations and waiver and release issues. Opinion of the Sixth Circuit at 9 (Petition at 9a).

have delayed the finality, but not changed the outcome, of this litigation.

3. This Court Should Deny the Petition Because Petitioner Requested Certification Too Late in the Appellate Process.

This particular Petition should be denied because Petitioner belatedly sought certification only after receiving an adverse determination on the merits of the issues from the Sixth Circuit. Federal courts properly have been unwilling to exercise their discretion to certify state law questions when a litigant is using the certification procedure as a method of gaining a second chance to prevail on an issue that has already been resolved against it. *See, e.g., Fischer v. Bar Harbor Banking and Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989) ("Though the failure to raise the issue would not necessarily prevent our certifying at this late stage, it considerably weakens plaintiff's insistence on his right to certification."); *Tidler v. Eli Lilly and Co.*, 851 F.2d at 426 (denying request for certification in part because plaintiff did not request certification until after adverse decision had been entered); *Armijo v. ExCam, Inc.*, 843 F.2d at 407 (denying request for certification in part because court noted that "plaintiff did not request certification until after the district court made a decision unfavorable to her."); *Perkins v. Clark Equipment Co.*, 823 F.2d at 210 ("The practice of requesting certification after an adverse judgment has been entered should be discouraged."). In fact, in *Lehman Brothers*, then Justice Rehnquist, concurring, specifically criticized tactics like Petitioner's:

Thus petitioners seek to upset the result of more than two years of trial and appellate litigation on the basis of a point which they first presented to the Court of Appeals upon petition for hearing.

* * *

If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

416 U.S. at 393, 395.

In the present suit, had Petitioner believed that the issues it now seeks to certify – which statute of limitations applied to its claims and whether First American failed to plead correctly the issue of repudiation of the release – actually merited consideration by the Tennessee Supreme Court, Petitioner could and should have requested certification at the beginning of the appellate process.³ Instead, it waited until the Sixth Circuit resolved these issues against its position to claim that the issues are unsettled and deserving of certification. This Court should not encourage such use of the appellate and certification processes.

—◆—

³ Tenn. Sup. Ct. R. 23 does not provide for certification from a federal district court. Petitioner accordingly could not have sought certification at the district court level.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

Robert J. Walker

Anthony J. McFarland

Robert E. Cooper, Jr.

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Attorneys for Respondent



APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CUMBERLAND & OHIO)	
CO. OF TEXAS, the successor)	
corporation of HERBERT)	
MATERIALS INCORPORATED,)	CIVIL
)	ACTION
Plaintiff,)	NO. 3 88 0784
v.)	
FIRST AMERICAN BANK)	
OF NASHVILLE,)	
)	
Defendant.)	

PETITION FOR REMOVAL

(Filed Sept. 15, 1988)

TO: The Judges of the United States District Court for
the Middle District of Tennessee

Defendant, First American National Bank, (inac-
curately designated as "First American Bank of
Nashville"), respectfully shows to the Court as follows:

1. On the 18th day of August, 1988, the defendant
was served with a copy of a Summons and Complaint
filed in the Chancery Court for Davidson County, Tennes-
see, styled *Cumberland & Ohio Co. of Texas v. First American
Bank of Nashville*, being Docket No. 88-2226-I. The Com-
plaint was filed on August 17, 1988. A copy of the Sum-
mons and Complaint is attached hereto as Exhibit A. No
other proceedings have been had therein.

App. 2

2. The above-described action is one of which this Court has original jurisdiction under the provisions of 28 U.S.C. § 1331 in that it is a civil action arising under the Constitution, laws, or treaties of the United States, and specifically under 12 U.S.C. § 1971 *et seq.* (See ¶ 2.18 of Plaintiff's Complaint). Accordingly, this case can be removed under 28 U.S.C. § 1441(b) and/or (c).

3. The defendant has filed herewith a bond with good and sufficient surety conditioned as provided by 28 U.S.C. § 1446(d) that they will pay all costs and disbursements incurred by reason of this Petition for Removal should it be determined that this case was not removable or was improperly removed.

WHEREFORE, defendant prays that the above action now pending against it in the Chancery Court for Davidson County, Tennessee, be removed to this Court.

/s/ Robert J. Walker

Robert J. Walker

Anthony J. McFarland

Robert E. Cooper, Jr.

BASS, BERRY & SIMS

2700 First American Center

Nashville, Tennessee 37238

(615) 244-5370

ATTORNEYS FOR
DEFENDANT

App. 3

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Robert J. Walker, being first duly sworn, deposes and says that he is a member of the law firm of Bass, Berry & Sims, attorneys for the defendant, that he is duly authorized in the premises; that all of the allegations in the foregoing Petition for Removal are true to the best of his knowledge and belief.

/s/ Robert J. Walker
Robert J. Walker

Sworn to and subscribed before me this 15th day of September, 1988.

/s/ Janis M. Watts
Notary Public

My Commission Expires:

5/13/89

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Removal has been served upon Nader Baydoun and John I. Harris III, Suite 600, 49 Music Square West, Nashville, Tennessee 37203, by United States Mail, postage prepaid, this the 15th day of September, 1988.

/s/ Robert J. Walker

3
No. 91-800

Supreme Court, U.S.
FILED
DEC 17 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CUMBERLAND & OHIO CO.
OF TEXAS, INC., *Petitioner*

v.

FIRST AMERICAN NATIONAL BANK,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

Several of the Respondent's arguments in its Brief in Opposition are new or require comment because they mischaracterize matters relevant to this Court's consideration of the Petition. Petitioner responds to the Brief in Opposition as follows:

1. **Liberal certification of state law issues in diversity actions will not place an undue burden upon the judicial system and will clearly promote the policies underlying Erie Railroad v. Tompkins, 304 U.S. 64 (1938).**

The Respondent mischaracterizes the Petitioner's brief as a request to abandon this Court's opinions in Lehman Brothers v. Schein, 416 U.S. 386 (1974) and in Salve Regina College v. Russell, 111 S. Ct. 121 (1991). To the contrary, this Court should re-visit the issue of certification to frame guidelines which would increase the use of this procedure in instances where the federal appellate courts might otherwise unnecessarily attempt to predict state law.

The increased federal appellate review of state law which Salve requires brings with it the increased risk that the federal and state intermediate appellate courts will not predict or apply state law consistently prior to the issuance of a decision by the state court of last resort. Prior to a final determination by the state court of last resort, the federal and state appellate courts are at liberty to reach independent determinations of state law. - The adoption of the standards proposed by the Petitioner will tend to minimize the possible development of inconsistent federal and state interpretations of state law; will minimize the likelihood of forum shopping; and will reserve for the states the opportunity for their courts to establish their law. Petitioner does not suggest that the federal courts are incapable of accurately forecasting state law. However, the most accurate and the only definitive determination of state law can only derive from the state court of last resort.

Respondent argues that the Petitioner's proposed guidelines would unnecessarily burden the judicial system. The burden, if any, imposed by these standards is far outweighed by the certainty and judicial efficiency that would result from a final determination of state law by the state; by increased comity within our dual system of courts; and by the fact that the policies of Erie would be maximized.

Respondent also argues that the Sixth Circuit's opinion "does not conflict with any opinion of the Tennessee Supreme Court and accordingly will not promote forum-shopping." (Brief in Opposition, p. 9, emphasis added). In this case, the Sixth Circuit has rejected an intermediate state appellate decision which was specifically on point in order to predict how it felt the Tennessee Supreme Court would rule. It is the existence of inconsistent determinations between the federal and state intermediate appellate courts which pose the risk of forum shopping. Once the state court of last resort determines a state law issue, Erie mandates that the federal appellate court is bound by that determination.

2. The issues which the Sixth Circuit refused to certify are the type of important state law issues which require certification.

Respondent asserts that this is not an appropriate case in which to grant certiorari because it does not involve an unsettled issue of state law. (Brief in Opposition, p. 11). Respondent's statement is in error.

The Sixth Circuit, in a significant misreading of Vance v. Schulder, 547 S.W.2d 927 (Tenn. 1977), cited Vance for the proposition that all contract actions for damages relating to the "devaluation" of property are subject to Tennessee's three year tort statute of limitations, regardless of whether the plaintiff's action sounds in tort or contract. Vance was a fraud case in which the Tennessee Supreme Court held that tort actions involving monetary loss resulting from the disposition of property for less than its value

are subject to Tennessee's three year tort limitation period. The Vance Court specifically stated that it was applying the tort statute of limitations because the "gravamen" of the plaintiff's claim was in tort, for common law deceit. Significantly, the Vance Court also stated that "the six (6) year [contract] statute would be applicable" if the claim had been for breach of contract rather than the tort of deceit. Vance, 547 S.W.2d at 931. The Sixth Circuit did not address the tort-contract distinction in Vance, nor did it follow the subsequent Tennessee Appellate Court decision in Harvest Corporation v. Ernest & Whinney, 610 S.W.2d 727 (Tenn. Ct. App. 1980), perm. app. denied (Tenn. 1980) pet. rehear denied (1981) which did distinguished Vance on this point.

Although the Sixth Circuit clearly admitted¹ that it was predicting state law, Respondent argues that this is not an unsettled issue of state law. In addition to admitting its prediction of state law, and misconstruing a Tennessee Supreme Court decision, the Sixth Circuit rejected the written opinion of the district judge and disregarded an available state appellate court decision on, Respondent argues, a "settled" issue of state law. As a result of the Sixth Circuit's actions, a split of authority now exists between the state and federal appellate courts on this issue in Tennessee. Litigants will now have the ability to forum shop until the Tennessee Supreme Court has the opportunity, which was denied to it by the Sixth Circuit, to finally resolve any apparent dispute concerning the application of the statutes of limitation to contract actions in Tennessee.

The Respondent also argues that the Sixth Circuit correctly denied the Tennessee Supreme Court the opportunity to address these issues because the repudiation issue was treated by the Sixth

¹ Admitting its prediction, the Sixth Circuit stated that "we agree with the Seventh Circuit that Tennessee's highest court would impose..." the three year limitations period. Petitioner's Appendix, at page 7.

Circuit as an independent basis for reversal. Although this issue has not been directly addressed by the Tennessee Supreme Court, Tennessee appellate decisions clearly hold that the failure to repudiate a release, which is a form of estoppel, is an affirmative defense which must be timely asserted. Exum v. Washington Fire & Marine Ins Co., 297 S.W.2d 805, 41 Tenn. App. 610 (Tenn. Ct. App. 1955), cert. denied (Tenn. 1956). Because, under Tennessee law, the failure to repudiate a release may bar any claim subject to an otherwise avoidable release, it is an estoppel defense which is a matter of state substantive law. As such, it must be timely asserted as an affirmative defense in accordance with the federal rules of civil procedure pursuant to Erie.

Even if the repudiation issue were purely procedural, the Sixth Circuit clearly erred in relying upon it as an independent basis for reversal. It is undisputed that this affirmative defense was not asserted in Respondent's answer or even requested for inclusion in the pretrial order. The failure to timely present it waived it and precluded its consideration on appeal as a matter of federal procedure. F.R.C.P. 8(c); Macurdy v. Sikov & Love, 894 F.2d 818, 824 (6th Cir. 1990).

3. Petitioner's request for certification was not untimely.

Respondent argues that certiorari should be denied because the Petitioner's request for certification was untimely. Respondent's argument unfairly mischaracterizes the proceedings below. Petitioner prevailed on all of the present issues at trial and on the post-trial motions before the district court. Petitioner had no reason, prior to the issuance of the Sixth Circuit's decision, to foresee the strained interpretation of state law that the Sixth Circuit ultimately issued. Indeed, the prevailing law in the Sixth Circuit prior to Salve, which came down after the appellate briefs were

submitted, would have resulted in the Sixth Circuit's deference² to the district court's experienced interpretation of state law. This is not an instance in which the party moving for certification had multiple "bites at the apple," and then moved for certification after it was repeatedly unsuccessful in persuading the federal courts to adopt its interpretation of applicable law.

Respondent argues that "had Petitioner believed that the issue it now seeks to certify ... actually merited consideration by the Tennessee Supreme Court, Petitioner could and should have requested certification at the beginning of the appellate process." (Brief in Opposition, p. 16). Prior to the Sixth Circuit's decision, the law had been applied by the district court in a manner consistent with existing state cases and the general understanding of the practicing bar. Not until the Sixth Circuit's novel prediction of state law did the need for certification arise. Under these facts, Petitioner's request for certification was certainly not untimely.

CONCLUSION

The Respondent's argument fails to identify any significant justification for the continued absence of meaningful guidelines for certification, and underscores the need for this Court to re-examine the procedure and establish guidelines for certifying state law questions in diversity cases. For the reasons set forth herein and in its Petition, the Petitioner respectfully requests that this Court grant certiorari.

² Prior to Salve, the position of the Sixth Circuit was stated as follows:

"We generally defer to an experienced district judge's construction of state law, especially when as here that judge served as a state trial judge before appointment to the federal bench." Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988) reh'g denied (1989).

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